Muhamad Safarudin bin Baba & Anor v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEALS NO W-05-32 OF 2000 AND W-05-33 OF 2000

MOKHTAR SIDIN, MOHD NOOR AHMAD JJCA AND FAIZA TAMBY CHIK J

6 SEPTEMBER 2002

Criminal Procedure *— Appeal — Appeal against conviction — Conviction on charge of trafficking cannabis — Whether facts justified the application of the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 — Whether trial judge erred in finding of facts — Dangerous Drugs Act 1952 s 37(d), (da)*

On 14 January 1999, PW1 together with L/Kpl Ahmad Tarmizi and L/Kpl Karim were on a crime prevention assignment at Kuala Lumpur. PW1 saw the first appellant riding a motorcycle with the second appellant, as pillion rider, who was holding a wooden box. PW1 signaled the first appellant to stop, but instead of stopping the first appellant swerved to the left of the road between the edge of the road and PW1, and passed PW1. The motorcycle accelerated and proceeded further towards L/Kpl Ahmad Tarmizi where it proceeded similarly on the side of the road and fell over beyond L/Kpl Ahmad Tarmizi. The second appellant was apprehended by PW1 whilst his right leg was pinned underneath the motorcycle and holding the box. The first appellant got up and tried to run away but was arrested by L/Kpl Ahmad Tarmizi. The wooden box was locked and no key was found on the appellants. PW1 used a screwdriver from his motorcycle to prise open the box. Inside the box, the police party found, among others, a plastic bag with 60 small clear packets containing plant material suspected to be cannabis and a compressed slab of plant material wrapped in aluminum foil and clear plastic. Upon analysis, the chemist confirmed that the plant material found in the 60 small clear packets and the compressed slab of plant material were cannabis as defined in s 2 of the Dangerous Drugs Act 1952 ('the Act'). Both the first and second appellants were convicted and sentenced to death on a charge of trafficking in 1,031.9g of cannabis. The appellants appealed to the Court of Appeal.

Held, allowing the appeal:

(1) In the instant case, the facts did not justify the application of the presumption of trafficking under s 37(da) of the Act as the second appellant was not found in actual possession of the drugs but only justified the application of the presumptions of possession and knowledge as to the nature of such drugs under s 37(d). Therefore, the learned judge in convicting the second appellant for trafficking had erred in taking into account the quantity of

drugs and the paraphernalia found in the box, the nature of its packing and the absence of defence that either or both of the appellants were users of cannabis and in concluding that such drugs were not for their own consumption but were carried for the purpose of sale or distribution to others. The second appellant could have been convicted only with an offence under s 6 of the Act for possession of such drugs and punishable under s 39A(2) thereof (see p 363C–E).

(2) Although the conduct of the first appellant on that occasion and his awareness that the second appellant was carrying the box might be relevant factors in considering the element of common intention, nevertheless the knowledge presumed by s 37(d) of the Act upon the second appellant ought not to have been imputed to the first appellant because he did not have custody or control of the box. Those two relevant factors by themselves were not sufficient to raise the inference of common intention, although they might raise the suspicion that the first appellant was involved with such drugs. Suspicion, no matter how strong, is not evidence (see pp 363H–364A).

[Bahasa Malaysia summary

Pada 14 Januari 1999, PW1 bersama dengan L/Kpl Ahmad Tarmizi dan L/Kpl Karim sedang menjalankan tugas pencegahan jenayah di Kuala Lumpur. PW1 telah melihat perayu pertama menunggang sebuah motosikal dengan perayu kedua, sebagai pembonceng, yang sedang memegang sebuah kotak kayu. PW1 telah membuat isyarat untuk berhenti kepada perayu pertama tetapi perayu pertama telah tidak berhenti dan membelok tiba-tiba ke kiri jalan raya di antara bahagian tepi jalan raya dan PW1, dan telah lalu PW1. Motosikal tersebut telah memecut dan bergerak ke arah L/Kpl Ahmad Tarmizi di mana ia telah bergerak ke tepi jalan raya dan telah jatuh setelah melepasi L/Kpl Ahmad Tarmizi. Perayu kedua telah ditahan oleh PW1 sementara kaki beliau dihimpit di bawah motosikal tersebut dan memegang kotak tersebut. Perayu pertama bangun dan cuba lari tetapi telah ditahan oleh L/Kpl Ahmad Tarmizi. Kotak kayu tersebut terkunci dan tiada kunci yang dijumpai pada perayu-perayu tersebut. PW1 telah menggunakan sebuah pemutar skru daripada motosikalnya untuk membuka kotak tersebut. Di dalam kotak tersebut, parti polis telah menjumpai, di antara lain, beg plastik dengan 60 paket jernih yang mengandungi bahan tumbuh-tumbuhan yang disyaki kanabis dan sekeping bahan tumbuh-tumbuhan yang dimampatkan yang dibungkus dengan kertas aluminum dan plastic jernih. Setelah dianalisakan, ahli kimia mengesahkan bahawa bahan tumbuh-tumbuhan tersebut adalah kanabis seperti yang ditafsirkan di dalam s 2 Akta Dadah Berbahaya 1952 ('Akta tersebut'). Kedua-dua perayu tersebut telah disabitkan dan dihukum mati di atas pertuduhan

mengedar 1,031.9g kanabis. Perayu-perayu telah merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Di dalam kes ini, fakta-fakta tidak menjustifikasikan pemakaian anggapan pengedaran di bawah s 37(da) Akta tersebut kerana perayu kedua tidak mempunyai milikan sebenar dadah tersebut tetapi hanya menjustifikasikan pemakaian anggapan milikan dan pengetahuan sifat dadah tersebut di bawah s 37(d). Oleh itu, hakim yang arif, di dalam mensabitkan perayu kedua untuk mengedar dadah telah khilaf kerana mengambil kira kuantiti dadah tersebut dan perlengkapan yang dijumpai di dalam kotak tersebut, sifat pembungkusannya dan ketiadaan pembelaan sama ada mana-mana atau kedua-dua perayu menggunakan kanabis, dan dalam memutuskan bahawa dadah tersebut bukan untuk kegunaan sendiri tetapi telah dibawa untuk dijual atau diedarkan ke orang lain. Perayu kedua hanya dapat disabitkan dengan kesalahan di bawah s 6 Akta tersebut untuk pemilikan dadah tersebut dan boleh dihukum di bawah s 39A(2) Akta tersebut (lihat ms 363C–E).

(2) Walaupun kelakuan perayu pertama di dalam keadaan tersebut dan kesedaran beliau bahawa perayu kedua sedang membawa kotak tersebut mungkin merupakan perkara-perkara relevan di dalam menimbangkan unsur niat yang sama, tetapi pengetahuan yang dianggap oleh s 37(d) Akta tersebut di atas perayu kedua tidak sepatutnya dikaitkan kepada perayu pertama kerana beliau tidak mempunyai penjagaan atau pengawalan kotak tersebut. Kedua-dua faktor tersebut dengan sendirinya tidak mencukupi untuk membangkitkan rasa syak bahawa perayu pertama terlibat dengan dadah tersebut. Rasa syak, tidak kira betapa kuatnya, bukan merupakan keterangan (lihat ms 363H–364A).

[*Editorial Note*: The prosecution has appealed to the Federal Court vide Rayuan Jenayah No 05–31–2002(W).]

Notes

For cases on appeal against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 151–152.

Cases referred to

Mahbub Shah v King Emperor AIR 32 1945 PC 116 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor [1981] 1 MLJ 64 (distd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Wong Kee Chin v PP [1979] 1 MLJ 157 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37(d), (da), 39A(2), 39B(1)
Penal Code s 34
Misuse of Drugs Act 1973 [Singapore] ss 3, 15, (c)

Appeal from: Criminal Trial No 45–37–99 (High Court, Kuala Lumpur)

Bhagwan Singh (*Suzana Norlihan Alias* with him) (*Bhagwan Singh & Suzana*) for the first appellant.
Karpal Singh (*Karpal Singh & Co*) for the second appellant.
Jamal bin Mohamed (Deputy Public Prosecutor) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court): Both the first and second appellants were convicted and sentenced to death on a charge of trafficking in 1,031.9g of cannabis. The charge reads:

> Bahawa kamu pada 14 Januari 1999 jam lebih kurang 5.50 pagi di persimpangan Jalan Dato' Senu 10 dan Jalan Dato' Senu 11, Taman Dato' Senu, Sentul, Kuala Lumpur, Wilayah Persekutuan, dengan niat bersama oleh kamu berdua, telah mengedar Dadah Berbahaya iaitu 1,031.9 gram cannabis dan oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersekali dengan Seksyen 34 Kanun Keseksaan.

On appeal, we allowed their appeals, quashed the conviction and set aside the sentence. However, in respect of the second appellant, we reduced the charge to an offence under s 6 and punishable under s 39A(2) of the Dangerous Drugs Act 1952 ('the Act'). He pleaded guilty to the substituted charge and we convicted him on that charge. After considering his mitigation, we sentenced him to 12 years' imprisonment to commence from the date of his arrest and ordered ten strokes of whipping.

Briefly, the case for the prosecution is this. On 14 January 1999 at about 5.30am, PW1 together with L/Kpl Ahmad Tarmizi and L/Kpl Karim were on a crime prevention assignment at Jalan Dato' Senu 10, Sentul, Kuala Lumpur. PW1 saw the first appellant riding a motorcycle and coming out of the junction from Jalan Dato' Senu 11 to Jalan Dato' Senu 10 with the second appellant as pillion rider who was holding a wooden box (exh P4). PW1 signaled the first appellant to stop, but instead of stopping, the first appellant swerved to the left of the road between the edge of the road and PW1, and passed PW1. The motorcycle accelerated and proceeded further towards L/Kpl Ahmad Tarmizi where it proceeded similarly on the side of the road and fell over beyond L/Kpl Ahmad Tarmizi. The second appellant was apprehended by PW1 whilst his right leg was pinned underneath the motorcycle and holding the box. The first appellant got up and tried to run away but was arrested by L/Kpl Ahmad Tarmizi. The box was locked and no key was found on the appellants. The lid of the box was locked with a small padlock by way of a hinge. PW1 used a screw driver from his motorcycle to prise open the box. Inside the box, the police party found a plastic bag with rubber bands, a plastic bag with empty small clear packets,

A a plastic bag with 60 small clear packets containing plant material suspected to be cannabis and a compressed slab of plant material wrapped in aluminium foil and clear plastic. Upon analysis, the chemist confirmed that the plant material found in the 60 small clear packets and the compressed slab of plant material were cannabis as defined in s 2 of the Act.

B The learned judge called for the defence in respect of the second appellant by invoking the statutory presumption under s 37(d) of the Act, that is to say, as he was found to have had in custody or under his control the box which contained the drugs, and until the contrary is proved, he was deemed to be in possession of the drugs and until the contrary is proved, he was deemed to have known the nature of the drugs. With regard to the first C appellant, the defence was called by reason of s 34 of the Penal Code ('the Code'), that is to say, common intention. The learned judge said (at pp 15–19 of *Pendakwa Raya v Muhamad Safarudin bin Baba & Anor* [2000] MLJU 500 ('the MLJU report'):

> D While conduct of the first accused leads to the irresistible inference that he knew what was in the locked wooden box P4, knowledge alone does not make him in possession so as to be liable for the offence of trafficking as defined in s 2 (see *PP v Lai Ah Bee* [1974] 2 MLJ 74). Although he cannot be unaware that the second accused riding pillion behind him was holding the box P4, there is no direct evidence linking him to physical custody and control of P4. Though he clearly had knowledge of the existence of the box P4 held by the E second accused, that fact alone would not lead to an irresistible conclusion that the first accused, as the rider, had physical custody and control of the box or that he or the second accused had knowledge of what was in the box P4. He cannot be held guilty unless he can be linked to possession of the dangerous drugs in the box P4.
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> At the same time, while the second accused had physical possession of the F box P4, the conduct of the first accused as he tried to disregard the instructions of PW1 to stop cannot be burdened upon the second accused who was riding pillion and had no control over the motorcycle. In this case s 37(d) of the Dangerous Drugs Act was invoked to presume possession and knowledge of the dangerous drugs in P4 against the second accused.
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> The fact remains that there is no evidence linking the first accused to G possession of P4, its contents of dangerous drug and knowledge of the nature of the dangerous drugs.
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> It is noted that the liability is in respect of acts, not knowledge. Thus H knowledge of the contents and nature of contents of P4 of the first accused as betrayed by his conduct cannot necessarily be attributed to the second accused. Common intention would however make the first accused liable to the act of the second accused of possession of P4 as if he himself had possession of the box P4 directly.
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> ...
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> I ...
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> It is not always possible to prove knowledge or intention by direct evidence. Likewise a prior concerted plan. It must be inferred from the acts

and conduct of the parties and other relevant circumstances. A similar approach was adopted by the Supreme Court in *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314. No particular period of time is required to elapse before an act can be evidence of a prior intention or a concerted plan. It can emerge immediately before the act, and no formal meeting and resolution is required. In other words, the common intention can be formed or can emerge at any time. It can be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make it out is a question of fact in each case. What is important is that such act, at the time it was committed, is carried out in respect of a concerted plan.

In this case, it was the second accused who was actually carrying the wooden box P4. Section 37(d) imposes a presumption rebuttable on a balance of probabilities, that he had possession of the cannabis in the wooden box, and that he knew the nature of the cannabis. *While there is no evidence of a prior plan, the events showed that the first accused knew of the incriminating drugs in the box even though the box was locked and carried by the second accused. The first accused cannot be unaware of the second accused carrying the large box. There is no suggestion that the first accused was only carrying out the instructions of the second accused not to stop but to attempt to flee. The acts of the first accused leads to the irresistable inference he knew what was in the box was against the law. His acts, which betrayed his knowledge of the contents of P4, together with the knowledge presumed by s 37(d) upon the second accused shows a commonality of purpose in the carrying of P4. These facts show clearly that the carrying of the box on the motorcycle was an act carried out in concert by the two accused persons sharing a common knowledge of what was in the box.* Given the size of the box it would have been difficult if not impossible for the first accused to have carried the box on the motorcycle by himself. Furthermore the entire defences of the two accused persons at all times and as laid out in cross examination does not suggest that each is blaming the other as the person solely involved. Although in *Shamsuddin bin Hassan & Anor v PP* [[1991] 3 MLJ 314] the appellant was acquitted, it would appear that the decision was based solely upon the lack of any evidence which of two persons in the car threw out the bag. The fact the accused was driving the car chased by the police did not appear to have been advanced to the said court for consideration.

In the circumstances the Court finds that the prosecution has successfully made out a prima facie case of a common intention against the accused persons in relation to the dangerous drugs in the box. (Emphasis added.)

On the charge of trafficking, the learned judge said (at pp 19–21 of the MLJU report):

The cannabis in the box were packed in one compressed slab and in 60 small sealed plastic bags. Inside the box was also found more small plastic bags similar to the ones used in the 60 small sealed packets, and rubber bands such as those ordinarily used to tie small bundles of packets. The cannabis is clearly not packaged for consumption. The quantity is so large as to be inconsistent with own consumption. There is no defence advanced in cross examination that either or both of the accused persons are users of cannabis.

In the case of the first accused, given a) the unchallenged evidence that the cannabis in the box weighed 1,031.9 gms, and b) he knew of the cannabis in the box carried on his motorcycle he was riding and held by his pillion rider, c) that they were acting pursuant to a common intention, and d) the form and quantity of the dangerous drug and the paraphernalia found in the box leads

A to the irresistible inference that the first accused, who is not and does not claim to be a drug user, was trafficking in the cannabis (see *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64).

The application of the presumption under s 37(da) of the Dangerous Drugs Act 1952 that unless he proves to the contrary, he is presumed to be trafficking in the said dangerous drugs which would add substantially to the B prosecution case against the first accused is unnecessary.

In the case of the second accused, the evidence is more direct in that he had direct physical custody and control of the wooden box P4, and he cannot not know that he was carrying the box in his arms while riding pillion behind the first accused. He therefore has possession of the wooden box P4 and the presumption under s 37(d) of the Act applies, requiring him to prove on the C balance of probabilities that he was not in possession of the dangerous drugs in the locked wooden box P4 and had no knowledge of the nature of such dangerous drugs.

I have also considered the fact the wooden box P4 was locked. Now the lock is a small padlock. The lid of the box P4 is locked with the padlock by way of a hinge. PW1 only needed a screwdriver from his motorcycle to pull D out the hinge. The point made is that the box could be opened if the carrier wanted to do so. The position, to my mind, is no different from a sealed package. If the box had a more substantial locking arrangement such that a person must have a key to open the box, then the absence of the key is material. I find that is not the case here. The small and simple lock is obviously more easily removed than if the lid of the box had been nailed down. I find as E a fact that the nature of the locking of the box in this case does dispel the presumptions under s 37(d) of the Act.

...

...

Having considered all of the evidence adduced before the Court, be it by F way of examination in chief, cross examination and re-examination, the defences laid out in cross examination, and the submissions made thereon before the Court, this Court considered that the prosecution has made out a prima facie case against the accused persons, and in accordance with s 180(iii) of the Criminal Procedure Code, called upon the accused persons to enter upon their defences.

G The appellants elected to give evidence under oath. The gist of the defence is that of being innocent carriers. Briefly, the appellants whilst on their way home at about 1am stopped at a football field and joined one 'Joe' who was playing guitar with three others. At about 3am when they were about to leave, Joe asked them to carry the box which Joe said contained things for his sister in the hospital, and to deliver the same to his brother Rahmat who H was waiting at the emergency ward at the hospital. The learned judge found the defence to hold no truth whatsoever.

To keep within the limit of our function as the appellate court, we decline to interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. I However, it is incumbent upon us to intervene in a case where the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the same

questions would have arrived at the same conclusion (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395). A

With due respect, we are of the view that the learned judge had misdirected himself when he convicted the second appellant on trafficking in such drugs by relying firstly, on the statutory presumption under s 37(d) of the Act and secondly, on the quantity of such drugs and the paraphernalia found in the box, the nature of its packing and the absence of defence that either or both of the appellants were users of cannabis, to conclude that such drugs were not for own consumption but were carried for the purpose of sale or distribution to others, which falls within the definition of trafficking in s 2 of the Act. The learned judge relied on the Privy Council case of *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64. The learned judge also misdirected himself in convicting the first appellant on trafficking in such drugs based on common intention. B C

It is pertinent to note that the second appellant was not found in actual possession of such drugs but only deemed to have been in possession and deemed to have known to nature of such drugs based on the fact of being found having had in custody or under his control the box which contained such drugs, that is to say, the only linkage between him and such drugs is the fact of custody or control of the box which triggered the presumption of possession and knowledge. That being the case, he could not have been convicted of trafficking based on the quantity of such drugs found in his presumed possession because the statutory presumption under s 37(da) of the Act applies only to actual possession. In fact, by convicting him for trafficking based on presumptions of possession and knowledge arising out of the fact of control or custody would tantamount to the learned judge indirectly using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof. This is manifestly erroneous (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). The learned judge relied on the definition of trafficking in s 2 of the Act, in particular on the act of the second appellant in carrying the box which contained such drugs for the purpose of sale or distribution to others and cited the case of *Ong Ah Chuan* in support thereof. The decision in that case was based on the then existing provisions of the Singapore Misuse of Drugs Act 1973 ('the Singapore Act'). Although the Singapore Act contains the offending section on trafficking (s 3) that is virtually identical with our s 39B(1) of the Act, the structure of the Act is quite different. In particular, under the then s 15 of the Singapore Act even presumed possession of the specified quantity of a controlled drug will attract the statutory presumption of possession for the purpose of trafficking and whereas under s 37(da) of the Act a person is presumed to be trafficking if, only if, he is found to be in actual possession of the dangerous drug. The then s 15 of the Singapore Act states: D E F G H

> Any person who is proved or *presumed* to have had in this possession more than— I
>
> (a) ...
>
> (b) ...

A (c) 2 grammes of diamorphine (heroin) contained in any controlled drug; or

(d) ...

shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein. (Emphasis added.)

B And s 37(da) of the Act reads:

In all proceedings under this Act or any regulation made thereunder —

...

...

...

C (da) any person who is found in possession of —

(i) 15 grammes or more in weight of heroin;

...

...

(vi) 200 grammes or more in weight of cannabis;

D ...

...

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

...

E ...

In that case (*Ong Ah Chuan*), the accused person was found in actual possession of the heroin which exceeded 2g and that he was transporting the heroin. He was convicted for the offence of trafficking and sentenced to death. His appeals to the Court of Criminal Appeal and subsequently to the F Privy Council were dismissed. Lord Diplock said at pp 68–69:

... If nothing more is proved against an accused than the mere fact that he had the controlled drug in his possession, then an offence under s 6 is established but the graver offence under s 3 of trafficking is not, however large may be the quantity of the controlled drug involved. The Court of Criminal Appeal so held in Poon Soh Har & Anor v Public Prosecutor [[1977] 2 MLJ 126] *and Seow Koon Guan v Public* G *Prosecutor* [[1978] 2 MLJ 45]. *This holding, in their Lordships' view, was clearly right.*

...

So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorized by the Act or Regulations, H *involves an offence of having the drug in one's possession under s 6 but does not amount to the offence of trafficking under s 3.* It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of s 10 of the Drugs Act [Misuse of Drugs Act 1973 [Singapore]] and s 3(c) (which covers the same ground in part). These provisions make I the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under s 3; since they provide that a person who does any act preparatory to, or in furtherance of, or

for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under s 29 and the Second Schedule.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, *that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence.* To bring the provisions of ss 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer. (Emphasis added.)

With regard to the statutory presumption under the then s 15 of the Singapore Act, his Lordship stated at p 69:

So the presumption works as follows, when an accused *is proved* to have had controlled drugs in his possession and to have been moving them from one place to another:

(1) the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in s 2; but if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under s 3, whether that purpose was achieved or not. This is the effect of the provisions of ss 3(c) and 10.

(2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in s 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, *but to retain them solely for his own consumption.* (Emphasis added.)

His Lordship referred to the following passage of the judgment in *Wong Kee Chin v PP* [1979] 1 MLJ 157, which stated the effect of Singapore Act with clarity and accuracy, at p 70:

'When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under s *15(2) [not (2) but (c)] that the accused had the said controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting plus the presumption under s 15(2) [not (2) but (c)] would constitute a prima facie case of trafficking which if unrebutted would warrant his conviction.* In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him. The rebuttal will depend upon the evidence placed before the court. If he can

convince the trial court by a preponderance of evidence or on the balance of probabilities that *the drug was for his own consumption he would be entitled to an acquittal.* Factors such as the type of 'transporting', the quantity involved, whether or not the accused is an addict, would be relevant. It would be a question of evidence and the inferences to be drawn from the totality of the evidence before the court.' (Emphasis added.)

From the judgment, it is manifestly clear that the factors such as the drug was for personal consumption, the type of 'transporting' or 'carrying', the quantity involved, whether or not the accused was an addict, would be relevant to rebut the presumption under s 15(c) of the Singapore Act that the accused had the said controlled drug in his possession for the purpose of trafficking; likewise in relation to the presumption of trafficking under s 37(da) of the Act by reason of being found in actual possession of the said drug. However, in the case before us the facts do not justify the application of the presumption of trafficking under s 37(da) of the Act as the second appellant was not found in actual possession of the drugs but only justify the application of the presumptions of possession and knowledge as to the nature of such drugs under s 37(d). Therefore, the learned judge in convicting the second appellant for trafficking had erred in taking into account the quantity of drugs and the paraphernalia found in the box, the nature of its packing and the absence of defence that either or both of the appellants were users of cannabis and in concluding that such drugs were not for own consumption but were carried for the purpose of sale or distribution to others. To our mind, he could have been convicted only with an offence under s 6 of the Act for possession of such drugs and punishable under s 39A(2) thereof.

In respect of the first appellant, common intention was inferred from his conduct for not stopping when ordered to do so by PW1 but attempted to flee, his awareness that the second appellant was carrying the box and from the knowledge presumed by s 37(d) of the Act upon the second appellant; the sum total of which, according to the learned judge, shows clearly that the carrying of the box on the motorcycle was an act carried out in concert by both the appellants sharing a common knowledge of what was in the box. It is trite law that common intention within the meaning of s 34 of the Code implies a pre-arranged plan and to convict an accused person of an offence applying the section it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is difficult if not impossible to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case (see the Privy Council case of *Mahbub Shah v King Emperor* AIR 1945 PC 116). We are of the view that although the conduct of the first appellant on that occasion and his awareness that the second appellant was carrying the box might be relevant factors in order to consider the element of common intention but the knowledge presumed by s 37(d) of the Act upon the second appellant ought not to have been imputed to the first appellant because he did not have the custody or control of the box. Those two relevant factors by themselves were not sufficient to raise the inference of

common intention, although they might raise the suspicion that the first appellant was involved with such drug. Suspicion, no matter how strong, is not evidence.

Appeal allowed.

Reported by Peter Ling